83-2077

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LINDSEY M. SCOTT,

Petitioner,

v.

LARRY DIXON, RICHARD L. KELLY, LARRY LATHAM, WAYNE E. FLOYD and AMERICAN FIRE & CASUALTY COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Must a Section 1983 Plaintiff allege and prove that he has no adequate postdeprivation due process remedy and is he precluded as a matter of law from claiming § 1983 jurisdiction if he admits that he has a tort remedy under state law?

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The Respondent Larry Dixon respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals For The Eleventh Circuit entered in this proceeding on the 15th day of December, 1983.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto. The opinion of the District Court also appears in the appendix.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on the 15th day of December, 1983. A timely petition for rehearing was

denied on the 23rd day of March, 1984, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 42 U.S.C.A. § 1983 (1981).

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C.A. § 1983 (1981).

STATEMENT OF THE CASE

In this case, Petitioner Larry Dixon was sued in Federal Court for an alleged deprivation of liberty and property without due process of law in violation of 42 U.S.C. § 1983. The Plaintiff Lindsey M. Scott also attached to the § 1983 complaint three pendent state law claims for false imprisonment, malicious arrest, and malicious prosecution.

While Dixon had held public office as Chairman of the Glynn County Board of Commissioners, he had taken out a warrant for "endangering a security interest" in violation of Georgia Code Annotated § 26-1707 against Scott. This arose out of a purely private business transaction between Scott and Dixon over the sale of a truck and had nothing whatever to do with Dixon's public duties.

Dixon obtained this warrant from the Clerk of the State Court of Glynn County and he held the warrant in his possession for five months.

On January 19, 1981, after he had left public office, Dixon encountered two police officers in a restaurant, asked them if the warrant was still good, and requested that they accompany him to Scott's house.

According to Scott's allegations, Dixon demanded the truck from Scott at Scott's house. When Scott refused to give him the truck, Dixon left and the police officers arrested Scott. After an incarceration of only about thirty

minutes, Scott was released and the charge was later dismissed.

The two police officers were also sued in this case.

In reversing the grant of summary judgment to the police officers, the Court of Appeals stated:

> "If Officers Kelly and Latham allowed Dixon to use the criminal warrant to try to collect a debt before they effected the Appellant's arrest, a question has been raised as to their good faith."

Although finding that the Clerk of State Court was immune from liability because he was performing a judicial function in issuing the warrant, the Court of Appeals held that the allegation of a conspiracy between Dixon and the Clerk and the police officers was a sufficient basis for finding § 1983 jurisdiction against Dixon. The Court of Appeals stated:

> "Dixon acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt. Dixon clearly acted in conjunction with and obtained significant aid from state officials. The evidence permits a conclusion that Dixon conspired with Floyd to obtain the warrant, acted in bad faith in securing it, and used his prior position to procure its execution."

Dixon was at the time of this arrest a private citizen. There is no evidence that the Clerk of State Court or the police officers received any benefit from the arrest of Scott. There is no evidence that this arrest was part of any state policy or pattern of state activity.

Instead, the evidence in the case clearly demonstrates that this was an isolated instance of a private citizen causing another private citizen to be arrested for purely private reasons and that it was brought in Federal Court under § 1983 only through the allegations that Dixon

"conspired" with a judicial officer to get the warrant issued and that the police officers who executed the warrant did not act in good faith when the arrest was made.

REASON FOR GRANTING THE WRIT

The Plaintiff below, Mr. Scott, makes no claim that he does not have an adequate state remedy for this alleged deprivation of his liberty and property. Rather, he attaches his state law claims to his § 1983 complaint under pendent jurisdiction.

The laws of the State of Georgia provide a perfectly adequate remedy for Plaintiff Scott by authorizing suits for false imprisonment, malicious arrest and malicious prosecution.

Indeed, there is no substantive difference between Plaintiff Scott's § 1983 claim and his state law claims.

Since Plaintiff Scott has a perfectly adequate state remedy, there is no logical reason why he should be allowed to clog up the Federal Court with a claim which belongs in State Court.

There is no evidence and even no allegation that Plaintiff Scott has been or will be deprived of any postdeprivation procedural due process in State Court.

Plaintiff Scott makes no attack at all upon any aspect of the postdeprivation procedural due process scheme provided under state law. Instead, he avidly seeks to avail himself of that state procedural due process through assertion of the pendent state law tort claim.

In *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed. 2d 420 (1981), the Supreme Court held that the negligent deprivation of a prisoner's property does not violate due process if adequate state remedies are available to redress the wrong. Parratt held that in order to state a claim for relief in Federal Court under Section 1983, a Plaintiff must show that available state proce-

dures were not adequate to compensate him for the deprivation of his property.

In *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345 (9th Cir. 1981), the Ninth Circuit applied the *Parratt* principle to a § 1983 claim for assault and battery. In *Rutledge*, the Ninth Circuit held that, in the absence of suggestion that the postdeprivation procedures under state law were inadequate, the Federal Court must conclude that the alleged deprivation was not without due process of law and therefore the Plaintiff would be relegated to his tort law remedy under Arizona state law.

There seems to be no logical reason for drawing a distinction between property deprivations and state tort deprivations of liberty such as malicious prosecution or false arrest.

In *Vicory v. Walton*, 721 F.2d 1062 (6th Cir. 1983), the Sixth Circuit stated:

> "Section 1983 was not meant to supply an exclusive federal remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the Constitution's prohibition against property deprivations without procedural due process. Thus we hold that in Section 1983 damage suits claiming the deprivation of a property interest without procedural due process of law, the Plaintiff must plead and prove that state remedies for redressing the wrong are inadequate. In a procedural due process case under Section 1983, the Plaintiff must attach the State's corrective procedure as well as the substantive wrong. In the instant case the Plaintiff has neither alleged nor shown any significant deficiency in the State's remedies."

In *Palmer v. Hudson*, 697 F.2d 1220 (4th Cir. 1983) cert. granted, —— U.S. ——, 103 S.Ct. 3535, 77 L.Ed.2d 1386 (1983), the Fourth Circuit stated:

> "The District Court granted defendant's motion for summary judgment, reasoning that under Parratt v.

> Taylor, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), the intentional destruction of a prisoner's property is not a violation of due process, when the prisoner has an adequate remedy under state law. The district court also ruled that, accepting Palmer's allegations of harassment as true, it could not conclude that the allegations were of constitutional significance. We agree that under Parratt due process is not violated when a state official intentionally deprives an individual of his property by a random and unauthorized act if the state provides an adequate postdeprivation remedy."

Under the above cases, it seems clear that a Claimant under § 1983 alleging a deprivation of liberty or property without due process of law must at least *allege* that state postdeprivation procedures are inadequate.

Repeatedly at both the District Court level and in the Court of Appeals, Petitioner Dixon contended that this case should be dismissed from Federal Court because the Plaintiff Scott admittedly has a perfectly adequate remedy under state law.

In its decision, the Eleventh Circuit chose only to address the question of whether there was sufficient evidence of "state action" to justify § 1983 jurisdiction.

However, it is the position of Petitioner Dixon that it is not enough that there is deprivation of due process under color of state law.

Rather, Petitioner Dixon contends that the § 1983 Claimant must allege and at least make out a prima facie case that he has no adequate postdeprivation remedy under state law.

In this case, Plaintiff Scott attached his state law claims for false imprisonment, malicious arrest and malicious prosecution to his § 1983 complaint as separate counts under pendent jurisdiction. Georgia law clearly provides a postdeprivation tort remedy for such causes of action.

Therefore, by the allegations shown on the face of his complaint, Plaintiff Scott cannot possibly have a § 1983 action under the circumstances of this case because he has a totally adequate state law remedy.

Consider again the facts of this case as determined by the Court of Appeals:

(1) Petitioner Dixon acted as a private citizen in securing a warrant.

(2) According to the Court of Appeals, Petitioner Dixon "acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt."

(3) The Court of Appeals found that the evidence permitted an inference that Dixon "conspired" with the Clerk of Court to obtain a warrant and "used his prior position to procure its execution".

(4) The Court of Appeals stated that a question was raised as to the good faith of the police officers who made the arrest because they allegedly allowed Dixon to use the criminal warrant to try to collect a debt before they effected Scott's arrest.

(5) Plaintiff Scott made the exact same facts and allegations the basis for pendent jurisdiction claims under state tort law for false imprisonment, malicious arrest and malicious prosecution.

Under the above set of facts and claims, any state tort Plaintiff in a malicious prosecution action can subject any private citizen who takes out a warrant to a § 1983 action in Federal Court simply by alleging that the private party Defendant "conspired" with a judicial officer to get a warrant issued or by alleging that the police officers making the arrest did not act in good faith either because they were too slow or too fast.

It is the position of Petitioner Dixon that the Plaintiff in any such tort action must allege and prove that he does not have an adequate postdeprivation remedy in state court. Where, as here, a § 1983 Plaintiff admits in his complaint that he has an adequate state postdeprivation tort remedy, there can be no § 1983 jurisdiction as a matter of law.

CONCLUSION

The Court of Appeals erred as a matter of law in failing to hold that the Plaintiff's complaint is barred as a matter of law because Plaintiff has an adequate remedy under state law.

This the —— day of ————————, 1984.

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APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8376

LINDSEY M. SCOTT,
Plaintiff-Appellant,

versus

LARRY DIXON, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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[Filed Mar. 23, 1984]

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion December 15, 1983, 11 Cir., 1983, F.2d ——).

Before HATCHETT and CLARK, Circuit Judges, and SCOTT *, District Judge.

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983, did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. Section 46(d).

PER CURIAM:

The petition for rehearing having been considered by the two members of the panel, the same is hereby DENIED.

A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor it it, rehearing en banc is DENIED.

ENTERED FOR THE PANEL AND THE COURT:

/s/ Thomas A. Clark
United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 82-8376

D.C. Docket No. CV281-108

LINDSEY M. SCOTT,
Plaintiff-Appellant,

versus

LARRY DIXON, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Georgia

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[Filed April 5, 1984]

Before HATCHETT and CLARK, Circuit Judges, and SCOTT *, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Georgia, and was argued by counsel;

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983, did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED IN PART and REVERSED IN PART; and that this cause be, and the same is hereby, REMANDED to said District Court in accordance with the opinion of this Court;

It is further ordered that defendants-appellees pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

Entered: December 15, 1983

For the Court: Spencer D. Mercer
Clerk

By: /s/ Wanda A. Godfrey
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-8376

LINDSEY M. SCOTT,
Plaintiff-Appellant,

v.

LARRY DIXON, ET AL.,
Defendants-Appellees.

Dec. 15, 1983

Appeal from the United States District Court for the Southern District of Georgia.

Before HATCHETT and CLARK, Circuit Judge, and SCOTT *, District Judge.

CLARK, Circuit Judge:

In January 1980, defendant Larry Dixon sold a truck to plaintiff Lindsey Scott on credit. A dispute arose regarding the payment agreement. Plaintiff alleges that under the purchase agreement he was to paint Dixon's house in lieu of a $700 down-payment, trade in his old truck for credit of $600, and finance the $2,800 balance

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* Honorable Charles R. Scott, U.S. District Judge for the Middle District of Florida, was a member of the panel that heard oral arguments but due to his death on May 12, 1983 did not participate in this decision. The case is being decided by a quorum. 28 U.S.C. § 46(d).

pursuant to a retail installment contract. Plaintiff asserts that Dixon refused to allow him to paint the house but all installment payments were timely tendered. Dixon denies that he consented to permit Scott to work off part of the payment and that the payments were otherwise timely. The district court found plaintiff's version convincing, including that Scott gave Dixon a $700 check on the provision it not be cashed since sufficient funds were not available. The lower court found that Dixon wanted to repossess the truck on the allegation of improper insurance coverage.

Dixon, at the time Chairman of the Board of Commissioners, testified that on August 6, 1980 he sought legal advice from defendant Floyd, Clerk of the State Court of Glynn County, Georgia, on how to obtain the truck or payment therefor. Dixon swore out an affidavit for the issuance of a warrant for Scott's arrest, charging plaintiff with "endangering a security interest" in violation of Ga.Code Ann. § 26-1707 (1977).[1] Defendant Floyd issued the criminal warrant to Dixon. Floyd directed Dixon that he should take the warrant to the police for enforcement.[2]

Dixon kept the warrant in his possession for five months during which time he threatened plaintiff with legal action if the latter failed to pay for or return the

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[1] That section is presently codified at Off.Code Ga.Ann. § 16-9-51 (1982).

[2] Floyd issued the warrant pursuant to Ga.Code Ann. § 27-102 (1978). That section provided in pertinent part:

> Any judge of a superior, city, or county court, or justice of the peace, or any municipal officer clothed by law with the powers of a justice of the peace, may issue his warrant for the arrest of any offender against the penal laws, based either on his own knowledge or the information of others given to him under oath.

Ga.Code Ann. § 27-102 (1978). This section was amended in 1983 and recodified at Off.Code Ga.Ann. § 17-4-40 (Supp. 1983).

truck. On the evening of January 19, 1981, Dixon who was no longer Commissioner, "ran into" two police officers (defendants Kelley and Latham) at a restaurant, inquired into the continued viability of the warrant, and requested that they accompany him to plaintiff's home in the event of violence.

Arriving at plaintiff's home, Dixon approached Scott and requested the truck keys. The officers remained in the police car. When plaintiff refused to accede to Dixon's wishes, Dixon left in his own car and the officers arrested Scott. Subsequent to his incarceration, plaintiff was released on bond and the charge ultimately dismissed.[3]

Alleging a deprivation of liberty and property without due process of law in violation of 42 U.S.C.A. § 1983 (1981), Scott sued Dixon, Floyd, Kelley, Latham, and American Fire and Casualty Company (AFCC). Scott also alleged three pendent state law claims.[4] Defendants sought summary judgment on the ground that, among other things, plaintiff's claim fell outside the jurisdictional scope of section 1983.[5] Defendant AFCC also filed a motion for judgment on the pleadings.

Subsequent to oral argument, the district court granted the summary judgment motions of Dixon, Floyd, Kelley, and Latham. The district court found no section 1983 claim in that Dixon secured the warrant as a private citizen, Floyd enjoyed absolute immunity in exercising a discretionary judicial function and Kelley and Latham enjoyed qualified immunity in carrying out their duties in good faith. The court also granted AFCC's motion for

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[3] Apparently, no evidence existed that Scott had committed the charged offense.

[4] The state law claims were for false imprisonment, malicious arrest, and malicious prosecution. Record at 17-21.

[5] The motions and supporting materials of the original defendants are found in the Record at 307-45, 359-71, 372-80.

judgment on the pleadings, finding that AFCC bonded only the County Board of Commissioners and not Floyd. The motions of Alma and Mabel Dixon were overruled and denied, but based on their prior rulings, the district court declined to exercise ancillary jurisdiction over the fraudulent conveyance claim and dismissed it sua sponte. The lower court also dismissed the pendent state claims. After an independent review of the evidence viewed in the light most favorable to plaintiff, and upon application of the law governing these facts, we find the district court order granting summary judgments erroneous with respect to Dixon, Latham and Kelley. We reverse and remand.

Dixon

A claim grounded in section 1983 has as a prerequisite a finding of state action. Plaintiff must also show causal deprivation without due process of a right secured him by the federal laws. *Brown v. Miller*, 631 F.2d 408, 410 (5th Cir. 1980). Plaintiff's complaint alleges deprivation of both a liberty and property right. At the summary judgment hearing, Dixon's attorney "assume[d] that [Scott] was deprived of due process." Record Vol. 5 at 7. Likewise, the district court stated that "assuming a deprivation, it did not occur 'under color of state law.'" Record at 629. We therefore look only to the question of state action.

In the instant case, the district court found that Dixon "obtained the warrant as a private citizen" and thus did not act under color of state law. Both *Lugar v. Edmondson Oil Co., Inc.*,[6] 457 U.S. 922, 102 S.Ct. 2744, 73

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[6] The president and sole stockholder of Edmondson Oil petitioned pursuant to state law for a prejudgment attachment of Lugar's property. The petition simply alleged in conclusory terms that Lugar might dispose of his property in order to defeat creditors. A state trial judge later dismissed the attachment because Edmondson Oil had failed to carry the burden of establishing the

L.Ed.2d 482 (1982), and *Morrison v. Washington County, Alabama*,[7] 700 F.2d 678, 683-84 (11th Cir. 1983), were decided since the district court considered this case. These cases make clear the proposition that a private party acting pursuant to state law or in conjunction with state officials may, in certain circumstances, incur liability under section 1983. The conduct causing deprivation of the federal right must be "fairly attributable to the state." *Lugar*, 457 U.S. at 937, 102 S.Ct. at 2754, 73 L.Ed.2d at 495. This requirement is satisfied by a showing that the deprivation resulted from "the exercise of some right or privilege created by the state or by a rule of conduct imposed by the state or by a person for whom the state is responsible" and that "the party charged with the deprivation [is] a person who may fairly be said to be a state actor [either] because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the state." *Id.*

In the instant case, the state of Georgia provided a statutory scheme authorizing criminal prosecution of a person who endangers a security interest. Ga. Code Ann. § 26-1707. A state official issued and state officials executed a criminal warrant pursuant to the statute. Dixon acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt. Dixon clearly acted in conjunction with and ob-

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grounds for attachment. *Lugar v. Edmondson Oil Co., Inc.*, 639 F.2d 1058 (4th Cir. 1981). In the present case, a citizen may also have made private use of a state procedure with the help of state officials.

[7] A doctor at the Washington County hospital determined that a patient suffering from delirium tremens, a severe form of alcohol withdrawal, should not remain at the hospital. He requested that a staff member get the sheriff to come and remove the patient. The patient was then taken to the county jail where he later died of alcohol withdrawal. The court found that the doctor, although a private citizen, had "acted together with" and "obtained significant aid from state officials." 700 F.2d at 684.

tained significant aid from state officials. The evidence permits a conclusion that Dixon conspired with Floyd to obtain the warrant, acted in bad faith in securing it, and used his prior position to procure its execution. The appellant in response to the motion for summary judgment asserted that Dixon and others knowingly misused state procedure in violation of Scott's civil rights and that the procedure itself was invalid. Whether Dixon was acting as Commissioner or as a private citizen, the district court erred in finding an absence of genuine issues of material fact in light of *Lugar* and *Morrison, supra.* On the record before us in light of the controversy in the evidence, we cannot say as a matter of law that Dixon's actions were completely outside the purview of section 1983. We emphasize that we in no way intimate that every affiant to a criminal warrant engages in state action of a constitutional dimension. *Accord Lugar v. Edmondson Oil Co.*, 457 U.S. at 942, n. 23, 102 S.Ct. at 2757 n. 23. Nor do we suggest that Dixon is or is not liable under section 1983. We merely find that summary judgment was improvidently granted.

Floyd

In order to determine whether absolute immunity extends to Floyd, it is important to consider the "reasons underlying the creation of the immunity shield." *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972). The reasons for extending judicial immunity are to protect those officials with discretionary power similar to that exercised by a judge and thereby to ensure courageous exercise of that discretionary power. *Id.* The question which must be answered with regard to the extension of absolute judicial immunity, therefore, is whether the act performed by the officer is discretionary or ministerial in nature.

In this case, the district court correctly found that State Court Clerk Floyd exercises a discretion normally reserved to the judiciary. Floyd is empowered by the

1945 Acts p. 1095 § 4 to issue criminal warrants.[8] In deciding whether to issue such warrants, he must determine the law applicable to the complaint being lodged by the affiant and whether or not probable cause exists. Since Floyd performs a function normally handled by a judge, he falls within this circuit's narrow extension of absolute judicial immunity to court clerks.[9]

If Floyd were a judge, his absolute immunity would be assured despite the assertion by the appellant that Dixon and Floyd conspired with one another or reached an understanding about the issuance of a warrant to be used as a lever to pry possession of the truck from the appellant. The Supreme Court considered the issue of judicial immunity in *Stump v. Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). *Stump* provides that a judge will be shielded from liability if he has not acted in the "clear absence of all jurisdiction," 435 U.S. at 357, 98 S.Ct. at 1105, 55 L.Ed.2d at 339 (quoting *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 351, 20 L.Ed. 646 (1872)), and if his act is a judicial one. 435 U.S. at 360-62, 98 S.Ct. at 1106-07, 55 L.Ed.2d at 341-42. *Stump* also states that if judicial acts are done within his subject matter jurisdiction he will not be liable even if he acts in error, maliciously or in excess of his authority. 435 U.S. at 357, 98 S.Ct. at 1105, 55 L.Ed.2d at 339.

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[8] The 1945 Act provides:

> Section 4. Said Act is further amended by adding at the end of Section 10 and as a part thereof the following language:
>
> "In addition to the duties enumerated, the Clerk of the City Court of Brunswick and his deputies shall be authorized and empowered to administer all oaths in connection with the issuance of attachments, garnishments, dispossessory and distress warrants and other mense process, and other types of warrant and writs, both civil and criminal, which the Judge of said court can administer, and to issue in the name of the Judge of said court all such warrants and writs."

[9] *Williams v. Wood*, 612 F.2d 982, 985 (5th Cir. 1980); *Tarter v. Hury*, 646 F.2d 1010 (5th Cir. Unit A 1981).

Since Floyd issued the warrant against Scott under the authority granted by Georgia law, he does not appear to have acted in "the clear absence of all jurisdiction." The factors which determine whether an act is judicial "relate to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." 435 U.S. at 362, 98 S.Ct. at 1107, 55 L.Ed.2d at 342. Applying that test to the present case, it appears that there was a judicial act in this case. The issuance of a warrant would be a function normally performed by a judge. *See Brewer v. Blackwell*, 692 F.2d 387, 396 (5th Cir. 1982); *Keeton v. Guedry*, 544 F.2d 199, 200 (5th Cir. 1976). By going to the clerk's office to swear out the warrant, Dixon was dealing with Floyd in his "judicial" capacity.

Floyd, therefore, is immune even if he did conspire with Dixon by issuing a criminal arrest warrant to collect a debt. A finding of immunity for Floyd, however, is not determinative of Dixon's possible liability. As the Supreme Court decided in *Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185, 189 (1980), the dismissal on immunity grounds of a § 1983 action against a judge does not require dismissal as to the private parties involved. In *Dennis*, the judge had allegedly been bribed by one of the parties to the case to issue an injunction. As the Court noted, "[u]nder these allegations, the private parties conspiring with the judge were acting under color of state law; and it is of no consequence in this respect that the judge himself is immune from damages liability." 449 U.S. at 28, 101 S.Ct. at 186, 66 L.Ed.2d at 190.

Kelley and Latham

Police officers do not enjoy absolute immunity from civil liability for § 1983 violations. Instead, they require a qualified immunity only for the good faith performance of their duties. *Pierson v. Ray*, 386 U.S. 547, 87

S.Ct. 1213, 18 L.Ed.2d 288 (1967). Since the Supreme Court decision in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the standard for gauging the good faith of government officials, including law enforcement officials, has been an objective one. Officials "are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818, 102 S.Ct. at 2738, 73 L.Ed.2d at 410.

The district court based its finding of good faith on the part of Officers Kelley and Latham on the appellant's failure to rebut the testimony of the officers that they were simply carrying out their duties, or to produce evidence which would support an inference of bad faith. In reaching that decision, however, the district court overlooked a genuine issue of material fact regarding the manner in which the arrest warrant was executed. Officers Kelley and Latham did testify that they simply executed a facially valid arrest warrant given them by Dixon. Both testified that they were in possession of the warrant from the time Dixon approached them about executing it until Scott was delivered to the sheriff's office.

To controvert this, the appellant submits evidence inferring that the police accompanied Dixon to the Scott home in an effort to aid him in reclaiming the truck. Both the appellant and his wife testified in deposition that Dixon showed them the warrant and threatened to have Scott arrested if he did not turn over the keys. Only after the Scotts refused to comply did Dixon leave their home and turn over the warrant to the police waiting at the end of the driveway. Dixon also testified that he had the warrant in his possession when he spoke with the Scotts.

If Officers Kelley and Latham allowed Dixon to use the criminal warrant to try to collect a debt before they effected the appellant's arrest, a question has been raised

as to their good faith. The Tenth Circuit in *Lessman v. McCormick*, 591 F.2d 605, 611 (1979), found that allegations that the police arrested a woman on a warrant for overtime parking in order to aid a bank to collect its debt were sufficient to state a cause of action for deprivation of liberty under color of state law. The appellant in the present case has not only alleged but also testified to a similar deprivation. As the Court in *Harlow*, *supra*, noted: "By defining the limits of qualified immunity essentially in objective terms, we provide no license to lawless conduct . . . Where an official *could be expected to know* that certain conduct would violate statutory or constitutional rights he should be made to hesitate . . ." 457 U.S. at 819, 102 S.Ct. at 2739, 73 L.Ed.2d at 411 (emphasis added). Because the district court erred in finding an absence of a genuine issue of material fact with regard to the entitlement of Kelley and Latham to good faith immunity for their actions, we hold that summary judgment with respect to them was improperly granted.

AFFIRMED IN PART, REVERSED IN PART and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action No. CV 281 108

LINDSEY M. SCOTT

v.

LARRY DIXON, ET AL.

ORDER

The plaintiff brings this civil rights action pursuant to 42 U.S.C. § 1983 for deprivation of civil rights under color of state law stemming from his arrest on January 19, 1981 pursuant to a warrant which had been issued on the affidavit of defendant Larry Dixon. The action is brought in five counts; Count I is a claim under § 1983, Counts II-IV are pendent state law claims and Count V is a claim for fraudulent conveyance brought against defendants Larry Dixon and Alma and Mabel Dixon, Larry Dixon's wife and mother, respectively. All defendants filed motions for summary judgment. Additionally, defendant American Fire and Casualty Company filed a motion for judgment on the pleadings. Oral argument was heard on April 19, 1981 at which time the court orally granted the summary judgment motions of defendants Larry Dixon, Floyd, Kelly and Latham. The court granted American Fire and Casualty Company's motion for judgment on the pleadings. The motions of Alma and Mabel Dixon for summary judgment on Count V were overruled and denied; however, based upon the prior rulings, the court declined to exercise ancillary jurisdiction

over Count V and dismissed it sua sponte. All pendent state law claims, Counts II-IV, were dismissed. The following is a memorandum concerning the grant of summary judgment to defendants Larry Dixon, Floyd Kelly and Latham and the grant of judgment on the pleadings to American Fire and Casualty Company.

On a motion for summary judgment, the moving party bears the burden of showing that there is no genuine issue of fact and that it is entitled to judgment as a matter of law. *Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333 (5th Cir. 1978). The non-moving party must then set forth specific facts showing that a genuine issue remains for trial. *Id.* In this case the movants have supported their motions with depositions and affidavits establishing the following material facts.

Plaintiff purchased a truck from Larry Dixon on January 21, 1980. In lieu of a $700 down payment, plaintiff also wrote Dixon a $700 check which Dixon promised not to cash, both parties apparently agreeing that the check would not be covered by plaintiff's available funds in the bank. A dispute later developed; plaintiff claims that although he was ready to paint Dixon's house, Dixon wanted the $700 in cash. Dixon also apparently wanted to repossess the truck, there being a further dispute as to whether the truck was properly insured, as well as whether the plaintiff was keeping up with his payments.

On August 6, 1980, Dixon procured a warrant for the arrest of the plaintiff for "endangering a security interest," a violation of *Ga. Code Ann.* § 26-1707. The warrant was issued by defendant Wayne Floyd, Clerk of the State Court of Glynn County, Georgia. Dixon kept the warrant in his possession until January 19, 1981, when he delivered it for execution to Glynn County Police Officers, Kelly and Latham, also defendants in this action. Dixon and the officers drove to the plaintiff's house, where Dixon apparently attempted to coerce the plaintiff into

giving up the truck by threatening him with arrest. During this conversation on the plaintiff's front steps, the officers remained in their squad car. There is no evidence that the officers overheard the conversation between Dixon and the plaintiff. After the plaintiff refused to give up the truck, Dixon drove away in his own car and the officers arrested the plaintiff. The plaintiff posted bond later that night and the charge was subsequently dismissed.

Dixon was a member of the Glynn County Board of Commissioners at the time the warrant was issued. His term in office expired on December 31, 1980. There is no evidence that Dixon used his status as a County Commissioner to procure the warrant for the plaintiff's arrest. Neither is there any evidence of a conspiracy between defendant Dixon and another county official, either defendants Floyd, Kelly or Latham, regarding the plaintiff's arrest.

In order to be entitled to relief under 42 U.S.C. § 1983, the plaintiff must show (a) that the defendant deprived him of a right secured to him by the Constitution or federal law and (b) that the deprivation occurred under color of state law. *Brown v. Miller*, 631 F.2d 408, 410 (5th Cir. 1980). Here, assuming a deprivation, it did not occur "under color of state law." Even though Dixon was a county commissioner at the time the warrant was issued, he obtained the warrant as a private citizen. "[T]he act of one who is a state officer, not taken by virtue of or clothed with his state authority, will not be considered as done under color of state law simply because the individual, although pursuing private aims, happens to be a state officer." *Id.* at 411. Floyd testified in his deposition that he often issued warrants to individual citizens and that the issuance of the warrant in this instance was to Dixon as a private citizen. There is no evidence that Dixon was acting under "authority" or "pretense" of state law in obtaining the warrant. *Dahl*

v. Akin, 630 F.2d 277 (5th Cir. 1980). Neither is there any evidence that defendant Dixon was acting "under color of state law" when he retained the warrant in his possession upon its issuance. Defendant Floyd testified in his deposition that when arrest warrants are issued, he may transmit them directly to the law enforcement agency responsible for execution or he may give the warrant to the complainant for transmittal to the proper law enforcement agency. In this case, the warrant was given to defendant Dixon who kept the warrant in his possession for over five months.

As Clerk of the State Court of Glynn County, defendant Floyd is empowered to issue arrest warrants in the name of the State Court Judge. Georgia Laws 1943, p. 702 as amended Georgia Laws 1945, p. 1092, 1095. The plaintiff has challenged the constitutionality of the special legislation permitting the clerk of the State Court of Glynn County to issue warrants; however, the court finds the challenge to be without merit. In issuing arrest warrants, the clerk exercises discretion normally reserved to the judiciary; therefore, in this instance, the clerk should be extended absolute judicial immunity from damages actions. *See Stump v. Sparkman*, 435 U.S. 349 (1978); *McCray v. Maryland*, 456 F.2d 1, 3 (4th Cir. 1972). *Cf. Williams v. Wood*, 612 F.2d 982 (5th Cir. 1980). Accordingly, defendant Floyd is immune from liability under 42 U.S.C. § 1983 for his actions in issuing the arrest warrant.

Police officers are entitled to qualified immunity from suit for official actions taken in good faith. *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980). The officers have testified by deposition that they were simply carrying out their duties as police officers in executing the warrant and effecting the arrest of the plaintiff. The plaintiff has produced no evidence to rebut this or to support any inference of bad faith on the part of defendants Kelly and Latham. The warrant was valid on its face. The fact

that it did not contain the name of the State Court Judge of Glynn County is merely a technical defect and does not affect the validity of the warrant. *See Courtney v. Randolph*, 125 Ga. App. 581 (1972). Nor was the date on the warrant sufficient to put the officers on notice of a "stale" warrant. *Cf. Manning v. Mitchell*, 73 Ga. 660 (1885) (warrant nine years old did not provide basis for arrest).

Based upon the foregoing, the court concludes that the plaintiff's claims under 42 U.S.C. § 1983 must fall as the deprivation complained of did not occur "under color of state law." Further, the court finds that defendants Floyd, Kelly and Latham are immune from damages as a matter of law for actions taken in their official capacity regarding the plaintiff's arrest. The plaintiff has had an opportunity to depose the defendants and others but has been unable to produce anything other than conjecture and speculation to support his contention that a cause of action under 42 U.S.C. § 1983 exists. "In order to successfully defeat a motion for summary judgment however, more than mere allegations and conclusory statements must be offered." *United Steelworkers, Etc. v. University of Alabama*, 599 F.2d 56 (5th Cir. 1979). While the plaintiff may have claims at state law, the federal claim is without substance. Accordingly, summary judgment for defendants Larry Dixon, Floyd, Kelly and Latham is appropriate.

By its terms, the bond upon which American Fire and Casualty Company is sued in favor of the Glynn County Board of Commissioners. As the obligation does not run in favor of the plaintiff, judgment on the pleadings for American Fire and Casualty Company is appropriate. American Fire and Casualty's summary judgment motion is dismissed.

The plaintiff has filed a motion to reconsider the court's oral ruling on April 19, 1928 denying the plaintiff's motion to add Glynn County as a defendant and a

motion to reconsider the oral ruling granting judgment on the pleadings for American Fire and Casualty Company. Both of these motions are hereby overruled and denied.

SO ORDERED, this 22 day of May, 1982.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL
Judge, United States District Court
for the Northern District of Georgia,
Sitting by Designation

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

Civil Action File No. 281-108

LINDSEY M. SCOTT

vs.

LARRY DIXON, WAYNE E. FLOYD, AMERICAN FIRE & CASUALTY CO., RICHARD L. KELLY, LARRY LATHAM, ALMA C. DIXON and MABEL C. DIXON

JUDGMENT

This action came on for (hearing) before the Court, Honorable G. Ernest Tidwell, United States District Judge, presiding, and the issues having been duly (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that in accordance with the Order of this Court entered on May 24, 1982, judgment is entered against plaintiff, LINDSEY M. SCOTT, and in favor of defendants.

Dated at Brunswick, Georgia, this 2nd day of June, 1982.

HENRY R. CRUMLEY, JR.
Clerk of Court

/s/ Carolyn F. Rawland
Deputy Clerk

No. 83-2077

In The

Supreme Court of the United States

October Term, 1983

LARRY DIXON,

Petitioner,

vs.

LINDSEY M. SCOTT, RICHARD L. KELLEY and LARRY LATHAM,

Respondents.

BRIEF OF RESPONDENT, LINDSEY M. SCOTT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Must a 42 USC § 1983 plaintiff allege and prove that he has no adequate post-deprivation due process remedy and is he precluded, as a matter of law, from claiming § 1983 jurisdiction if he admits that he has a tort remedy under state law?

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STATUTE

JURISDICTION

This Respondent acknowledges that the petition for certiorari was timely filed but denies that it presents any of the considerations for certiorari outlined in Rule 17 of the Supreme Court. The question presented was not raised, or not properly raised, in the District Court and has not been decided by the District Court or the Circuit Court of Appeals. Further, the Eleventh Circuit's decision is not inconsistent with the authorities cited in the petition for certiorari.

Thus, the Court should deny the discretionary review requested.

No. 83-2077

In The

Supreme Court of the United States

October Term, 1983

LARRY DIXON,

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Respondents.

BRIEF OF RESPONDENT, LINDSEY M. SCOTT, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

This Respondent adopts the statement of the case made by the United States Court of Appeals for the Eleventh Circuit and objects to Petitioner's statement,

insofar as it is inconsistent therewith. *Scott v. Dixon*, 720 F. 2d 1542 (11th Cir., 1983)

The District Court decided the case on summary judgment motions. It is procedurally significant that arguments on the motions were heard after the parties had announced ready at the call of the case for trial (R. Vol. 5, at 3, Transcript). The consolidated pre-trial order had previously been approved. (R. 536)

The Court of Appeals for the Eleventh Circuit, after reviewing the record, found there were genuine issues of material fact in the case and held that the District Court's order granting summary judgments to the Petitioner, Larry Dixon, and the Respondents, Richard L. Kelley and Larry Latham, was erroneous.

———o———

REASON FOR DENYING THE PETITION

A. Summary of the Argument.

(1) The issue presented in the petition for certiorari was not, or not properly, raised in the District Court and has not been decided by either the District Court or the Circuit Court.

(2) The decision of the Eleventh Circuit is not inconsistent with the authorities relied upon by the Petitioner.

(3) *Parratt v. Taylor* does not stand for the principle asserted by the Petitioner.

B. Argument.

(1) The issue presented in the petition for certiorari was not, or not properly, raised in the District Court and has not been decided by either the District Court or the Circuit Court.

Petitioner contends the plaintiff must allege and prove that he has no adequate post-deprivation remedy under state law as a condition precedent to stating a cause of action and obtaining relief under 42 USC § 1983. In other words, so the argument goes, the plaintiff must attack as being inadequate any post-deprivation tort action he might have under state law and, if he fails to do so, Federal jurisdiction and § 1983 relief are precluded as a matter of law.

The denial of the performance or occurrence of a condition precedent is a special matter which a party must allege specifically and with particularity in his pleading. Rule 9(c), Fed. R. Civ. P.; *Lumbermen's Mutual Insurance Company v. Bowman,* 313 F. 2d 381 (10th Cir., 1963); *Evaluations Systems, Inc. v. Aetna Life Insurance Company,* 555 F. Supp. 116 (N.D. Ill., 1982). This was not done. Indeed, the issue presented in the petition for certiorari was never raised in any manner in the pre-trial order (R. 505-536) or the defensive pleadings. (R. 28-63, 76, 80, 83-86, 97, 137-152) In the pre-trial order, the petitioner simply stated:

> "[d]efendant, Larry Dixon, submits that this action is not properly brought as a § 1983 action and that it does not belong in Federal Court." (R. 505)

In his supporting brief, which was filed with the motion for summary judgment ten days before the pre-trial hearing, the petitioner said:

"[i]n *Parratt v. Taylor*, 68 L. Ed. 2d 420, the Supreme Court stated:

> 'Accordingly, in any § 1983 action, the initial inquiry must focus on whether the two essential elements to a § 1983 action are present; (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States.'

> "It is the simple position of defendant, Larry Dixon, that this case does not belong in Federal Court. This in reality is nothing more than a casue (sic) of action based upon a common-law tort which is well-provided for under the tort law of Georgia. The laws of the State of Georgia in fact provide an ample tort remedy for the claim asserted by the plaintiff." (R. 360)

This is the closest the petitioner came in the trial court to raising the question presented in the petition for certiorari. However, that statement did not actually raise, or adequately raise, the issue. Even if it did, the Petitioner abandoned it in his oral argument when he said:

> "As it turned out, the defendant (sic) was probably deprived due process for the purpose of this motion. For the purpose of this motion, I think we will assume that the defendant (sic) was deprived of due process.
>
> "The question, though, is whether Mr. Dixon was acting under color of state law." (R. Vol. 5 at 6-7, Transcript)

In *Parratt v. Taylor*, 51 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), this Court's inquiry focused

> ". . . on whether the respondent, ha[d] suffered a deprivation of property *without due process of law.*"

(emphasis added) *Id* at 451 U.S. 538, 68 L. Ed. 2d 430, 101 S. Ct. 1914.

The Petitioner clearly waived that question. Significantly, the above-quoted statement by Petitioner's counsel was not made at an early stage of the litigation. To the contrary, it was made after he had announced ready at the sound of the case for trial. (R. Vol. 5, at 3, Transcript) Consequently, the District Court, in ruling on the motion for summary judgment, considered only whether the alleged deprivation occurred under color of state law and, after making specific reference to the above-quoted statement, the United States Court of Appeals for the Eleventh Circuit said:

> "[*w*]*e therefore look only to the question of state action.* (emphasis added)
>
> *Scott v. Dixon*, supra, at 720 F. 2d 1545.

Having obtained an adverse ruling on the state action question, the Petitioner now seeks to present a different issue to this Court by petition for writ of certiorari. This Court has generally declined to decide issues which are neither raised in the lower courts nor considered by the Circuit Court of Appeals and it should refuse to do so here. *Tacon v. Arizona*, 410 U.S. 351, 35 L. Ed. 2d 346, 93 S. Ct. 998 (1973); *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 at 325, 32 L. Ed. 2d 95 at 100, 92 S. Ct. 1562 at 1565; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 at 147, 26 L. Ed. 2d 142 at 148, 90 S. Ct. 1598 at 1602-1603 (1970).

(2) The decision of the Eleventh Circuit is not inconsistent with the authorities relied upon by the Petitioner.

Parratt v. Taylor simply held that where state procedures would provide adequate redress, deprivations of

property due to *negligent* actions of state officials are not deprivations *without due process of law.* The Court recognized the impracticality, if not impossibility, of providing a meaningful and effective pre-deprivation procedure which could have prevented the loss of a prison inmate's $23.00 hobby kit and emphasized that the "deprivation" suffered by the inmate did not result from an established state procedure. The Court carefully explained the important distinction between a challenge to an established state procedure as lacking in due process and a property damage claim resulting from the negligence of state officers. Each of the other authorities relied on by the Petitioner recognized this distinction and emphasized that an effective pre-deprivation procedure was impossible under the circumstances involved. See *Palmer v. Hudson,* 697 F. 2d 1220, at 1222 (4th Cir., 1983); *Rutledge v. Arizona Board of Regents,* 660 F. 2d 1345, at 1352 (9th Cir., 1981); *Vicory v. Walton,* 721 F. 2d 1062, at 1064-1065 (6th Cir., 1983).

The liberty deprivation in this case occurred when a Clerk, pursuant to an established state procedure, issued a criminal arrest warrant. Pursuant to state custom or procedure, or because of the lack of an established state procedure, the warrant was given to the Petitioner, Larry Dixon, and not to law enforcement personnel authorized by law to execute warrants. The Petitioner kept the warrant for six months and then used it in an attempt to repossess a truck. Had state procedure mandated that judicial officers who issue warrants deliver them to those persons authorized by law to make service thereof, this could not have happened.

The Respondent challenged the state's procedure and alleged that the deprivations resulting therefrom were without due process of law. (R. 11-12, 67-68)

The Circuit Court found that:

> "*Dixon acted pursuant to a procedural scheme which permitted through its abuse the arrest of Scott for not paying a debt.* Dixon clearly acted in conjunction with and obtained significant aid from state officials. The evidence permits a conclusion that Dixon conspired with Floyd to obtain the warrant, acted in bad faith in securing it, and used his prior position to procure its execution. *The appellant in response to the motion for summary judgment asserted that Dixon and others knowingly misused state procedure in violation of Scott's civil rights and that the procedure itself was invalid.*"
>
> (emphasis added) *Scott v. Dixon,* supra, at 720 F. 2d 1546

Therefore, the Eleventh Circuit's decision in the case sub judice is not inconsistent with the authorities cited in the petition for certiorari.

(3) Parratt v. Taylor does not stand for the principle asserted by the Petitioner.

Petitioner's argument was soundly rejected by this Court long before *Parratt.* See *McNeese v. Board of Education for School District 187, Cahokia, Illinois,* 373 U.S. 668, 10 L. Ed. 2d 622, 83 S. Ct. 1433; *Monroe v. Pape,* 365 U.S. 167, 5 L. Ed. 2d 492, 81 S. Ct. 473.

In *Monroe,* the Court said:

> "[i]t is no answer that the state has a law which if enforced would give relief. The Federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the Federal one is invoked. Hence, the fact that Illinois by its constitution and laws outlaws unreasonable searches and seizures is no barrier to the present

suit in the Federal Court." *Id* at 365 U.S. 183, 5 L. Ed. 2d 503, 81 S. Ct. 482.

Parratt cited *Monroe* with approval and specifically said:

> "[o]ur decision today is fully consistent with our prior decisions." At 451 U.S. 544, 68 L. Ed. 2d 434, 101 S. Ct. 1917.

In a later decision, this Court explained *Parratt* thusly:

> "This argument misses Parratt's point. In Parratt, the Court emphasized that it was dealing with 'a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.' . . . Here, in contrast, it is the state system itself that destroys a complainant's property interest . . . Parratt was not designed to reach such a situation . . . Unlike the complainant in Parratt, Logan is challenging 'the established state procedure' that destroys his entitlement without according him proper procedural safeguards.
>
> "In any event, the Court's decisions suggest that, absent 'the necessity of quick action by the state or the impracticality of providing any pre-deprivation process', a post-deprivation hearing here would be constitutionally inadequate. . . . That is particularly true where, as here, the state's only post-termination process comes in the form of an independent tort action."
>
> *Logan v. Zimmerman Brush Company,* 455 U.S. 422 at 436, 71 L. Ed. 2d 265 at 278, 102 S. Ct. 1148 at 1158 (1982)

It is therefore clear that *Parratt* does not stand for the proposition asserted in the petition for certiorari.

———o———

CONCLUSION

This Respondent is strongly opposed to the petition for writ of certiorari and, for the reasons given above, prays that it be denied.

Respectfully submitted,

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No. 83-2077

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BRIEF OF RESPONDENTS RICHARD L. KELLEY AND LARRY LATHAM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Must a 42 U.S.C. §1983 plaintiff allege and prove that he has no adequate postdeprivation due process remedy and is he precluded, as a matter of law, from claiming §1983 jurisdiction if he admits that he has a tort remedy under state law?

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BRIEF OF RESPONDENTS RICHARD L. KELLEY AND LARRY LATHAM, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

These Respondents adopt the Petitioner's Statement of the Case.

SUMMARY OF ARGUMENT

The Plaintiff/Respondent cannot invoke the jurisdiction of §1983 because he has an adequate postdeprivation remedy under state tort law. Therefore, he has not been deprived of any rights "without due process of law".

———o———

ARGUMENT

The avowed purpose of a responsive brief, as set out by Rule 22 of this Court, is to disclose ". . . any matter or ground why the cause should not be reviewed by this Court." For this reason, these Respondents initially had not intended to file a responsive brief as they fully agree with the Petitioner that Certiorari should be granted. As this Court has directed the Respondents to submit a brief, this opportunity will be taken to briefly elaborate on the basis on which Certiorari should be granted. The question presented, as set out by Petitioner is

> Must a Section 1983 plaintiff allege and prove that he has no adequate postdeprivation due process remedy and is he precluded as a matter of law from claiming §1983 jurisdiction if he admits that he has a tort remedy under state law?

The answer is yes under the decisions of this Court in *Parratt v. Taylor,* 451 U.S. 527 (1981) and *Ingraham v. Wright,* 430 U.S. 651 (1977).

However, it does not appear that all the Federal Courts of Appeals and District Courts concur and this calls for an exercise of the Supreme Court's power of

supervision, a basis for granting a Writ of Certiorari under Rule 17.1(a).

In the instant case, the due process issue is controlling but the Eleventh Circuit Court of Appeals totally ignored it and limited its discussion on appeal to the issues of state action and immunity.

As this Court reiterated in *Parratt v. Taylor, supra,* there are four separate and distinct elements necessary to establish a valid claim under 42 U.S.C. §1983. These are (1) a deprivation of, (2) a right privilege or immunity secured by the Constitution or laws under, (3) the color of state law and, (4) without due process of law.

The first three elements, in and of themselves, are insufficient to establish a violation of the Fourteenth Amendment.

> Nothing in that amendment protects against all deprivations of life, liberty or property by the state. The Fourteenth Amendment protects only against deprivation "without due process of law". *Baker v. McCollan,* 443 U.S. 137, 145 (1979); *Parratt, supra* at 537.

If it is assumed, without deciding, that the alleged actions of the defendants below deprived the Plaintiff/Respondent of "liberty" within the meaning of the Fourteenth Amendment, then the focus of attention must be on whether or not this was done "without due process of law". *Rutledge v. Arizona Bd. of Regents,* 660 F.2d 1345, 1352 (9th Cir. 1981).

In the present case, the Eleventh Circuit erred in not focusing, addressing, or even mentioning, the controlling issue of due process.

This presents a somewhat strange situation since the Eleventh Circuit has now belatedly delivered a cogent analysis of this exact point in *Gilmere v. City of Atlanta,* (No. 82-8457, 11th Circuit, decided July 9, 1984 Slip. Op. p.4473).

The time has now come for the Supreme Court to clarify the purpose of §1983 and place it in its proper perspective.

> Section 1983 was not meant to supply an exclusive remedy for every alleged wrong committed by state officials. Rather, the statute is a remedy for only those wrongs which offend the constitutional prohibition against . . . deprivation without procedural due process. *Vickery v. Walton,* 721 F.2d 1062, 1065 (6th Cir. 1982).

The issues are simply what is due process and is it available in the remedies provided by the state courts.

As this Court noted in *Parratt,* due process is an "opportunity to be heard . . . in a meaningful time and in a meaningful manner." *id.* at 540; *Armstrong v. Manzo,* 380 U.S. 545 (1965).

That meaningful opportunity is adequately provided in postdeprivation remedies if a predeprivation hearing is impractical and a postdeprivation hearing provides meaningful redress. *Parratt, supra.* Obviously, in isolated incidents of wrongdoings such as false arrest, police brutality, etc., any type of predeprivation hearing is impractical and, in fact, impossible. However, the civil and criminal remedies provided by state law are sufficient if they afford significant protection. *Ingraham, supra.*

Therefore, "the issue becomes merely whether the remedies available under [Georgia] law and in the

[Georgia] courts constitute the postdeprivation hearing required by the Fourteenth Amendment". *Rutledge v. Arizona Bd. of Regents, supra* at 352. Here, the plaintiff is provided with a "whole panalopy of remedies." *Barnier v. Szentmiklosi,* 565 F.Supp. 869 (E.D. Mich. 1983). The Plaintiff/Respondent acknowledges this in his complaint as he seeks to invoke pendant jurisdiction of the U.S. District Court to pursue claims for false imprisonment under Ga. Code Ann. §105-901 (now O.C.G.A. 51-7-20); malicious prosecution under Ga. Code Ann. §105-801 (now O.C.G.A. 51-7-40), and false arrest under Ga. Code Ann. §105-1001 (now O.C.G.A. 51-7-1).

The Plaintiff/Respondent has a fully adequate remedy in money damages under Georgia law. There is no need that the plaintiff have the same rights to damages under state law as he would have under federal law or even that the rights need to be as extensive. *Parratt, supra.* The controlling factor is whether or not the Georgia Courts provide a means of redress which will fully compensate the plaintiff for his alleged injury. *Parratt, supra.*

As set out above, the plaintiff has a tort action under Georgia law and there is no reason to believe the Georgia Courts would not be as determined to prevent such wrongs as the Federal Courts would be. *Ellis v. Hamilton,* 669 F. 2d 510 (7th Cir. 1982).

Parratt opened the floodgates to the Federal Courts by holding that negligence could provide a basis for deprivation of rights which could be asserted under §1983. If the resulting flood of claims is not controlled by limiting Federal jurisdiction to claims for which there is no ade-

quate remedy under state law, "then the Fourteenth Amendment becomes a font of tort law to be superimposed upon whatever systems may already be administered by the states." *Paul v. Davis,* 424 U.S. 693, 701 (1976), *Parratt, supra.*

Simply, when a postdeprivation remedy is available to a plaintiff which will adequately compensate him, he is relegated to his remedies under tort law in the State Courts. *Rutledge, supra.*

The remaining issue for clarification, and the one which has caused the greatest conflict between the Courts, is whether *Parratt* is limited to its facts, that is, the negligent deprivation of property, or does its scope include the intentional deprivation of life and liberty as well.

The Fourteenth Amendment itself provides no basis to differentiate between life, liberty and property but provides equal dignity for each.

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

This Court has already addressed this specific issue in *Ingraham* which involved corporal punishment and therefore included intentional acts resulting in personal injury and explicated that there was no violation of §1983 because of the "common law safeguards that already exist". *Ingraham, supra* at 682.

Once you assume that a postdeprivation remedy can cure a negligent act, that principle applies equally to rendom and unauthorized intentional acts. *Palmer v. Hudson,* 697 F.2d 1220, 1223 (4th Cir. 1983).

Just as "nothing in language of §1983 or its legislative history limits the statute solely to intentional deprivation of constitutional rights", *Parratt,* at 534, the converse is likewise true. Nothing in its language or history limits its application to negligent acts.

Obviously, the ruling in *Ingraham* controls intentional acts and there is no purpose to be solved by further complicating §1983 by including any state of mind standard, whether intentional, negligent or even strict liability. *Vickery, supra.* In fact, all that does is simply direct a plaintiff's attorney to allege in his complaint that the actions were done negligently and/or intentionally.

The logical conclusion that *Parratt* cannot be restricted solely to negligent deprivations of property has been applied by several courts. *Gilmere v. City of Atlanta, supra; Ellis v. Hamilton, supra; Palmer v. Hudson, supra; Rutledge v. Arizona Bd. of Regents, supra; Barnier v. Szentmiklosi, supra; Vickery v. Walton, supra.*

However, not everyone has gotten the word. *See, Tarkowski v. Hoogasian,* 532 F.Supp. 791 (N.D. Ill. 1982); *Scott v. Donovan,* 539 F.Supp. 255 (N.D. Ga. 1982); *House v. DeBerry Correctional Inst.,* 537 F.Supp. 1177 (M.D. Tenn. 1982). There even remains some controversy within the Supreme Court itself concerning the expansion or limitation of *Parratt* as noted by the concurring opinions of Justices Blackmun and White.

The Respondent Scott, in his brief to this Court, contends that the *Parratt* decision is not controlling because he has challenged a state procedure and that the state procedure itself constitutes a denial of due process and there-

fore this case comes within the purview of *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

However, he has not shown a deprivation as a result of an established state procedure but, at best, has raised a factual question as to whether the actions of the defendants constituted state action so as to fulfill the "color of state law" requirement of §1983.

Logan is inapplicable because the deprivation alleged in the instant case was not pursuant to an established state procedure. Rather, the deprivation, if one occurred, was allegedly due to a random and unauthorized abuse of a valid state procedure. Very simply, Scott alleges the improper issuance and service of an arrest warrant. If this were to constitute a denial of due process by established state procedure, then every action which was done under color of state law would result in a federal claim. In any false arrest or police brutality case, there would be deprivation under established state procedure since it is state law which empowers the police officers to arrest or take someone into custody. Obviously, this is not the intent nor purpose of §1983.

In *Gilmere v. City of Atlanta, supra, Logan* is distinguished and the rationale there likewise applies to the present case. In *Gilmore,* the Eleventh Circuit noted that *Parratt* involved a random and unauthorized act by a state employee and was not the result of some established state procedure such as in *Logan.* In *Logan,* the State had, by operation of law, destroyed the plaintiff's property and *Parratt* was simply not designed to cover that situation. *Ingraham, supra,* was also differentiated from

Logan, because State Court remedies provided adequate postdeprivation due process.

> In the instant case, unlike the situation in *Logan,* the plaintiff did not prove a deprivation caused by an established state procedure. The deprivation was caused instead by an unpredictable and unauthorized act. *Parratt* shows that in such a case due process can be satisfied by an adequate postdeprivation hearing, e.g., a state tort suit. *Gilmore,* text slip op. at 4491.

In *Gilmere,* as in the present case, it is *Parratt* and *Ingraham* which are controlling and *Logan* is inapposite.

This controversy should be resolved and the time has again come for this Court to put its shoulder to the wheel to provide assistance to the various Courts of Appeals and District Courts in their struggle to analyze claims such as the present one that are commonly thought of to state a claim for a common law tort normally dealt with by the state courts, but instead are couched in terms of constitutional deprivations and relief sought under §1983. *Parratt, supra* at 533.

The burdens on the Federal Courts grow daily and, in the twelve month period ending June 30, 1982, seventeen thousand cases were filed in the U.S. District Courts alleging deprivations of civil rights. *Barnier v. Szentmiklosi, supra.* To grant the Writ of Certiorari and clarify the meaning of *Parratt* would allow this Court to stem that tide and put the common law tort claims back where they belong, in the state court systems.

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CONCLUSION

The Plaintiff/Respondent was not denied "due process" and has fully adequate remedies in the Courts of Georgia. Certiorari should be granted to relegate this claim to its proper forum, the State Courts, and to clarify the scope of *Parratt v. Taylor, supra.*

Respectfully submitted,

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